UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CORNER INVESTMENT COMPANY, LLC
D/B/A THE CROMWELL

And Case 28–CA–209739

ROBERT COVERT,
AN INDIVIDUAL

Sara S .Demirok, Esq.,
for the General Counsel.
Jonathan S. Sack, Esq.,
Charles S. Birenbaum, Esq.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in Las Vegas, Nevada on July 17, 18, 2018. Robert Covert, an individual filed the charge on November 13, 2017,[1] and filed an amended charge on February 22, 2018. The General Counsel issued the complaint on February 22, 2018.

On the entire record, including my observation of the demeanor of the witnesses[2], and after considering the briefs filed by the General Counsel and the Respondent[3], I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent has been engaged in operating a hotel and casino, providing lodging, food and entertainment in Las Vegas, Nevada. During the past 12 months ending in November 13, 2017, Respondent has purchased and received goods valued in excess of $5000 at its Las

[1] All dates are 2017 unless otherwise indicated.

[2] Witnesses testifying at the hearing included Robert Covert, Raymond Bautista, Ruswood Roque, Kristina Donathan, Aisha Collins, Eric Golebiewski, Julian James Begich, Angela Pfeifauf, and Roland Muertegui.

[3] The exhibits for the General Counsel are identified as "GC Exh." and Respondent's exhibits are identified as "R. Exh." The closing briefs are identified as "GC Br." and "R. Br." for the General Counsel and the Respondent, respectively. The hearing transcript is referenced as "Tr."

Vegas facility directly from points outside the State of Nevada. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Paragraph 4 of the complaint (GC Exh. 1(e)) alleges that

(a) From about December 31, 2016, through about October 12, 2017, Respondent's employee Covert engaged in concerted activities with other employees for the purposes of mutual aid and protection and concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent's employees, by raising concerns about another employee's actions causing unsafe and otherwise unfavorable working conditions and Respondent's failure to address those actions with other employees and Respondent.

(b) About October 12, 2017, Respondent, by Ruswood Roque, at Respondent's facility: (1) promulgated an overly broad and discriminatory directive prohibiting its employees from talking to others about discipline issued to them; and (2) threatened its employees with suspension and unspecified reprisals for engaging in protected concerted activities.

(c) About October 12, 2017, Respondent issued a final written warning to Covert.

(d) About November 2, 2017, Respondent suspended Covert.

(e) About November 9, 2017, Respondent discharged Covert.

1. The alleged protected concerted activity of Robert James Covert

The counsel for the General Counsel alleges that the Respondent engaged in the conduct against Covert as described in paragraph 4 of the complaint order to discourage him and other employees from engaging in these or other concerted activities and that the Respondent engaged in interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(l) of the Act.

Robert James Covert (Covert) was previously employed as a security officer for the Respondent's Cromwell Hotel and Casino from April 21, 2014 until November 9, 2017. His duties consisted of, among other responsibilities, assisting with the slot attendants, standing on post, keeping general security of the property and interacting with guests and employees. Covert was also a training instructor for new recruits on security issues; employer policy and procedures; proper apprehension and retention procedures; and in dealing with unruly patrons. At the time, Security Sergeant Kristina Donathan (Donathan), was Covert's immediate supervisor. Donathan reported to Captain Ruswood Roque (Roque).

Between December 2016 and November 2017, Covert worked with six other security officers, namely, Jason Lick, who also served as the field training officer, Michael Behrens, Raymond Bautista, Juan Sarabia, Austin Woo, and Kendrea Poole. Covert testified that there

was a double standard and safety issues with Michael Behrens (Behrens) that started in January 2016.

Covert recalled that he was working with Behrens on a 12-hour shift on New Year's Eve 2016 by the elevators to the hotel. Covert said their responsibility at that post was to verify that hotel guests had keys to enter the hotel elevator. Convert testified that Behrens simply walked off his post. Covert had a subsequent general conversation with officer Sarabia about coverage on their respective posts and the conversation turned to Behrens, who was away when he was supposed to be on post. Covert said he was concerned that Behrens was not at his post to check bags and to observe customers, who may be coming into the casino with alcohol, weapons or drugs (Tr. 155–158). Covert admitted that he did not know if Behrens was directed to attend another assignment or had permission to leave his post (Tr. 193, 194).

Covert stated that there was also a double standard with Behrens. Covert maintained that Behrens was able to do whatever he wanted, such as inappropriately tackling officer Lick in August without being disciplined, and only working 8 hours instead of 12 during a boxing event at the casino.

Regarding the incident with officer Lick, Covert said it was related to him by Lick that Lick was breaking up a fight, when Behrens tackled the suspect and in the process, also tackled Lick. Covert said that Behrens' tackle was contrary to their security training. Covert said that he was informed by Lick about the incident. Covert was not present when the incident occurred. Covert did not know if Lick had informed a supervisor about Behrens' role in the incident (Tr. 194, 195).

Regarding the boxing event, Covert worked a 12-hour shift and testified that Behrens only worked 4 hours. Covert admitted that he had no knowledge of Behrens' work schedule on that night (Tr. 194).

Covert said he spoke to officers Raymond Bautista (Bautista) and Lick about this double standard, usually on an individual basis. Covert estimated he had 5–10 conversations with the other officers. Covert said that Bautista talked about Behrens walking away from his post without any consequences. According to Covert, Bautista related to him that it was not right for Behrens to walk off his post.

Covert said he complained to Donathan about Behrens in September 2017 in her office. Covert said no one was present during these conversations. Covert said he brought up the double standard issue of Behrens leaving his post without any discipline. Donathan replied that she will speak to Behrens about it. Covert said he also told Donathan that it was a safety issue when Behrens was AWOL from his post.

It is not clear exactly how many conversations Covert had with Supervisor Donathan about Behrens, but Covert believed that he spoke Donathan 5–10 times in September, but could not recall any conversations in October. According to Covert, Donathan would tell him that she had spoken to him, but Covert noticed that Behrens' conduct did not change for the better (Tr. 162–165). Covert testified that all of his complaints about Behrens to Donathan were verbal and he never complained by email or in writing (Tr. 195, 196).

In addition, during the September timeframe, Covert also complained to Donathan about the increased of hours from 2 to 4 hours at the elevator post assignments. The complaint of standing for a longer period of time was tiresome and Covert suggested a chair or podium. This issue was also raised at preshift briefings by other officers to Donathan (Tr. 175, 176).

Raymond Bautista (Bautista) was employed by the Respondent from April 2017 until January 2018. Bautista was a security office and coworker with Covert at the Respondent's facility in Las Vegas. Bautista's immediate supervisors were Steve Harmon and Donathan. Bautista also identified Michael Behrens as a fellow security officer. At the time of the hearing, Bautista was working at another Las Vegas hotel and casino and had voluntarily left the Respondent for a different line of work.

Bautista recalled having conversations with Covert about Behrens during the July-September time frame. Bautista said that Covert would relate to him about his frustrations over Behrens because he was away from his post for "a couple of hours and we had to cover him . . ." (Tr. 218). Bautista testified that these conversations would occur in passing with Covert "venting" maybe 3 to 5 times during this period. Bautista did not recall whether Covert said he was going to speak with a supervisor about Behrens.

Bautista testified that Covert would approach him complaining about Behrens not being at his post. Bautista said that he was aware through his own observations that Behrens would not be at his post a couple of times per week (Tr. 222–224).

Bautista testified that there were group briefings among the security officers before they are sent on their assignments. Bautista recalled that on occasions, the issue of having a post assignment by the elevator came up. Bautista said that the officer by the elevator would greet and ensure that individuals entering the hotel elevators were in fact guests of the hotel. He said that some officers complained that the 8 to 12-hour shift for the elevator post was too long and a request went to the supervisor that a chair or a podium be placed by the elevator post for the guard to lean or sit during that post. Bautista did not recall who had made that request.

Bautista ended his testimony by stating that he is not aware of any officer being disciplined while he was employed by the Respondent and only heard rumors that Covert was disciplined.

Kristina Donathan (Donathan) testified that she is employed by the Respondent as a security supervisor and has worked as a security sergeant for the past 2 years. Donathan has reported to Captain Roque since December 2016.

Donathan testified that she knows Covert and Behrens. She stated that Covert had approached her several times during quick one-on-one meetings complaining about Behrens. Donathan testified that Covert complained during the summer 2017 that Behrens was lazy and not doing his job. Donathan denied that Covert mentioned safety or any other issues in regard to Behrens' job performance (Tr. 121, 124, 125, 244, 247, 251, and 252). Donathan stated that Behrens also had complained to her that Covert was out to get him (Tr. 246). Donathan denied that Covert had complained to her about unequal treatment (Tr. 248).

Donathan testified that she knows officer Lick, but had no knowledge about any incident in July 2017 when Lick was injured.

With reference to officers' post assignments, Donathan testified that the proper protocol is that the officers stay on their posts. Donathan stated that Captain Roque had increased the hours for the post assignments by the elevators from 2 to 4 hours in 2017. Donathan also stated that an officer may leave his or her post for a number of different reasons, including break time, called away on an emergency, or given permission to leave. Donathan testified that Behrens has been disciplined, including suspended pending an investigation, in the past for attendance problems (Tr. 247).

2. The final written warning to Covert

Covert complained of receiving a final written warning on October 12 (GC Exh. 10). He stated that Corporal Roland Muertegui (who had substituted for Donathan on that day) and Roque were present at the meeting when the final warning was issued to him. According to Covert, Roque told him that he "was tired of the BS" over him and Behrens and Roque felt he had to babysit the two officers and asked why they could not get along. Covert told Roque that he had previously complained to Donathan about Behrens and Roque replied that he did not have any written statements against Behrens, but he does have written complaints about Covert (Tr. 166, 167). The warning stated as follows

> On 10/10/2017, Officer Robert Covert had a discussion with other associates regarding his dislike toward office Michael Behrens. This action has created a hostile work environment.

Covert testified that he was not aware of any complaints filed against him. Covert recalled he had a discussion with the other associates on October 10, but did not recall the contents of that discussion (Tr. 197, 198).

Covert repined that he was never given a reason for the written warning or an explanation as the hostile work environment that he allegedly created. Covert then signed his written warning and left the meeting.

3. The Respondent's rationale for Covert's final written warning

Julian James Begich (Begich) testified that he is employed as a security officer and also serves as a field training officer with the Respondent for approximately 1 year. Begich's responsibilities are similar to the duties previously performed by Covert.

Begich testified to his knowledge of Covert's interaction with Behrens. Begich completed a report of an incident involving Covert and another worker. Begich said he was walking with a slot technician named AJ. Sabra and Sabra made a satirical comment to Covert that Covert's "buddy" Behrens was in dispatch. Begich recalled that Covert responded that Behrens was "not his buddy" and that the remark made by Sabra was not funny. Begich said that Sabra replied that he didn't mean anything by his remark.

According to Begich, Covert responded that

"If paramedics showed up for Officer Behrens in dispatch, that he would take his time getting there."

Begich provided a voluntary written statement regarding the incident between Sabra and Covert (Tr. 233; R. Exh. 6).

Begich stated that Covert never discussed with him that Behrens was causing an unsafe working conditions for the officers. Begich said he never observed Behrens creating an unsafe work environment (Tr. 234, 235).

Abdullatif Sabra (Saba) provided a written statement on October 11 regarding his conversation with Covert (R. Exh. 10). Saba stated that as he was approaching Begich and Covert, Saba asked Covert if he was leaving early because Behrens was on duty. According to Sabra's statement, Covert went on a rant as to how much he hated Behrens and if Behrens

died right now in dispatch,, that he would not feel an ounce of sympathy, and that if paramedics arrived to help Mike (Behrens), he would take his time escorting them to Mike to give him medical care.

Roland Muertegui (Muertegui) testified that he has been employed as the security corporal with the Respondent for 3 years. He does not directly supervise Covert or Behrens but was aware of the incident resulting in the final written warning issued to Covert (Tr. 262, 263).

Muertegui stated that both Covert and Behrens came up to him on October 12 regarding a second incident at the dispatch office. According to Muertegui, Behrens was entering the dispatch office with his bag and Covert was partially standing by the doorway at the time. Behrens brushed against Covert on his way into the office and it is alleged that comments made comments about the brushing. Muertegui was not present but the incident was reported to him by Covert and Behrens. Muertegui requested both parties to make a written statement (Tr. 268; R. Exh. 9).

In the written statement prepared by Behrens on October 12, he stated that on his way into the dispatch office, his bag brushed against Covert. Behrens alleged that Covert yelled "can you say fucking excuse me." Behrens said he then got hold of officer Lick and notified him as to what had happened (R. Exh. 9 at 2).[4]

Jason Lick (Lick) also prepared a written statement. Lick stated that on October 12, Behrens pulled him aside after the morning briefing and said he had another altercation with Covert. According to Lick, he was informed by Behrens that Covert was blocking the doorway and Behrens apparently brushed his bag against Covert as Behrens entered the dispatch office. Lick said that Behrens told him Covert said, "you're not going to fucking say excuse me." Lick

[4] Covert did not provide a written statement to Muertegui.

said that Behrens was upset and he told Behrens to remain calm and report the incident to Muertegui (R. Exh. 9 at 3).

Ruswood Roque (Roque) has been the security captain for 1-1/2 year with the Respondent. He ensures the overall security operations of the Cromwell casino, as well as the LINQ and the Flamingo, under the direction of the security director. Roque knows Covert was a security officer and training instructor.

Roque testified that he received an email from Muertegui on October 12 regarding Covert allegedly brushing up against Behrens in the dispatch doorway by Covert (R. Exh. 9). Roque stated that he conducted an investigation and reviewed the statements written by Behrens and Lick. Roque decided to take no disciplinary action against Covert over the dispatch doorway incident.

However, Roque testified that he issued a final written warning to Covert because of the hostile statements made by Covert about Behrens. Roque and Muertegui met with Covert on October 12. Roque stated that (Tr. 283)

> About the statements, I believe it was remarks pertaining to if Michael Behrens were to drop dead or something would happen when Michael Behrens was in dispatch, he would not respond or he would take his time in responding. And Michael Behrens is a waste of air and a skin -- waste of skin-suit.

Roque testified that Behrens also received discipline over the same incident with Covert. Roque stated that Behrens received a documented coaching on October 12. The discipline stated, in part, that ". . . Behrens was conducting (himself) in the same type of behavior (as Covert) which results in conversations with other associates that creates a hostile work environment" (R. Exh. 11). Roque explained that under the Respondent's progressive discipline policy, Behrens received a documented coaching because he had no prior discipline for policy performance but noted that Behrens was on final written warning for his attendance infractions (Tr. 291, 292).

4. The alleged overly broad and discriminatory directive

Before Covert left the meeting after receiving his final written warning, it is alleged by Covert that Roque told him (Tr. 168)

> And before leaving the office, Russ (Roque) told me to keep this to myself. It's nobody else's business. Nobody else needs to know, nobody else has to know. And that's where he went into, well, personally, I wouldn't want anyone to know my business myself, so just make sure you keep this to yourself.

After Covert left the meeting, he went on his assigned shift. At the end of his shift, Covert called Roque to tell him that he no longer want to perform additional duties as the training instructor. Covert said he informed Bobby Johnson (Johnson), who was the security director at the time that he was resigning as a training instructor. Covert testified he met with Johnson about 2 weeks later, who he considered as a friend and mentor. Covert said Johnson

told him that he had received emails and texts from other unidentified supervisors who had considered Covert a "virus" and a "problem child" because he was complaining about his posts and that he didn't want to be an instructor any longer. Johnson suggested that Covert speak to Roque to "smooth things over" (Tr. 170, 171).

Covert subsequently met with Roque for approximately 1 hour. Covert began his conversation by saying he understood that complaining and being vocal was probably not conducive to the shift and how Roque wanted things to run. In response, Roque told Covert that he was a senior person and a training instructor and is expected to operate at a different level. Covert then interrupted and stated to Roque ". . . that's the problem is, there are double standards in play" (Tr. 172). Covert explained that he was being held to a higher standard which was not fair to him while others (like Behrens) are being held to a lesser standard. Roque again repeated that Covert was a senior officer and instructor and considered as "the go-to person."

According to Covert, Roque told him he should follow new procedures and rules instead of complaining about them. Covert complained to Roque about being an 8-hour shift with 2-4 hours standing at a post without a podium or chair. Covert said he had complained to Donathan about the length of time standing at a post and Donathan responded that it was the "captain's (Roque) rules." Covert said that the rule was subsequently changed for the better (Tr. 176).

Roque met with Covert after the issuance of the final warning (day or two after the warning was issued).[5] He recalled that Covert said he was going to do better, but does not recall anything else Covert had said. Roque told him he is a strong officer and encouraged him to continue moving up. Roque believed their meeting lasted less than 5 minutes. Roque denied telling Covert that he was held to a higher standard, but did state to Covert that there is a higher expectation because he was training instructor (Tr. 58).

Roque did not recall that Covert told him that he no longer wanted to be an instructor after receiving his final warning. Roque denied that Covert complained to him at this meeting (or at any time) that Behrens was treated more leniently than other officers (Tr. 60). Roque did not recall any other discussions he had with Covert at the meeting when the final warning was issued or at their subsequent meeting (Tr. 289, 290).

Roque stated that he did not formally meet with Johnson after his second meeting with Covert. However, Roque did have a conversation with Johnson during an officer training class. Roque mentioned to Johnson that Covert's attitude had changed after Covert received his final warning and told Roque he no longer wanted to do anything but go to work. Roque denied sending an email to Johnson stating that Covert's attitude had changed (Tr. 50–52).

Roque testified that he was aware that Covert and Behrens did not like each other, but he denied referring to Covert as a "problem child" to Johnson or saying to Johnson that Covert was complaining about certain things. Roque stated to Johnson that he wanted Covert to get "back on track" because he was a "strong officer" and was very willing to help. Roque thought Johnson would be helpful in getting Covert back on track (Tr. 53, 54).

[5] Covert testified that their meeting occurred 2 weeks later.

Roque testified that he was responsible for increasing the post hours for the elevator assignments from 2 to 4 hours. He did not recall when he changed the post hours for the elevator posts (Tr. 56). Roque did not recall that Covert complained about the change and denied speaking to Johnson that Covert complained about the change (Tr. 57). He denied that Covert personally complained to him or to any other officers about the increased hours. Roque did not recall if any other officers complained to him about the increased post hours (Tr. 94, 95)

5. The discharge of Robert James Covert

On November 2, Covert began his work shift at 3:00 p.m. Prior to the shift, there is a briefing among the security officers with Donathan. Donathan informed Covert that there was an outstanding report that he needed to immediately complete. Donathan told him that the report was a priority of the day for him. Covert represented that he went into the office to write up the report and completed the report on November 2 (GC Exh. 3). Covert said that he completed his part of the report except for some missing information that he needed from a security firm that was subcontracted to patrol the nightclub where the reported incident occurred. Covert said he needed time to contact the secondary security firm.

Covert testified that he did not complete the report when it was due on October 22 because he was busy working to complete a report involving another incident with the local police department. Covert insisted that he would routinely complete his reports by the end of his shift, but October 22 was a busy night. He stated that the supervisors would usually remind the officers that a report was due on the following day or when the officer returns to work after a weekend or vacation. In this instance, October 22 was on a Sunday and Covert did not return to work until Tuesday (Tr. 180-183; 200-204).

Covert then went back on his shift. At approximately 9:00 p.m., Covert was called to a meeting with Donathan and Roque. Roque told Covert that he was being placed on suspension but could not divulge the reason (Tr. 183, 184; GC Exh. 11). The suspension did not provide a reason for the discipline and stated the following

> Suspended pending investigation: On 11/02/2017, Security Officer Robert Covert was informed not to return to work until contacted by Human Resources or Security Management. He was further advised not to discuss the matter with anyone except Human Resources or Security Management.

Sergeant Donathan testified that she was on vacation starting on October 12 for 2 weeks and was not working on the day of the incident (October 22) when the two women were arrested in the nightclub. Donathan learned on November 2 that Covert had not completed his report of the October 22 incident after Captain Roque contacted her that the corporate legal department was asking for the report from the incident because the Respondent was being sued by the arrested women.

Donathan instructed Covert to write up the report on November 2. Donathan stated that Covert was suspended on November 2 after he completed his portions of the report because Covert failed to complete the report on the day of the incident. Donathan stated that Covert never gave her a reason for not completing the report on time (Tr. 245).

Donathan admitted that she is not aware of any other security officer who had previously been disciplined or discharge for failing to timely complete an incident report (Tr. 120).

Donathan also stated that she is not aware of any officer who had failed to complete an incident report on time. Donathan testified to one officer, Lt. Thomas Heather, who completed his report on January 26 when the incident occurred on January 23 and was excused because the officer was off from work for 2 days (Tr. 249; GC Exh. 6).

Roque testified that he recommended the discharge but the decision was made by Angela Pfeifauf in the human resources office. Roque stated that the basis for his recommendation was due to the Respondent's progressive discipline policy and that Covert was already on a final written warning (Tr. 47).

Roque testified that the standard policy is to place the officer on suspension pending an investigation. He stated that Covert was suspended because (Tr. 61)

> Due to the incident where a report was not completed regarding individuals that were claiming -- well, that were arrested at the Cromwell after being trespassed from the property. The report was not completed when I did research on that particular report.

Roque stated there is a level of expectation that a security officer would complete an incident report on the shift when the incident had occurred. He admitted that a superior is to remind the officer if the report is not done if known by a superior that a report was not done (Tr. 62–65). Roque also stated that a superior would not routinely know if a report is not completed (Tr. 95). Roque explained that unless notice was raised, no one would know that the report had not been done. He stated that there may be hundreds of entries during a shift and it is the officers' responsibility to complete incident reports (Tr. 288, 299). He also stated that on occasions, incidents may be "red flagged" by the officer or dispatcher as a reminder to themselves to complete the report. However, this was not done by Covert for the October 22 incident (Tr. 317).

Roque stated that Covert was reminded to do the report on November 2. Roque stated that he never asked Covert why he did not complete his report on time (Tr. 66). Once Roque was made aware that the report was not completed, he informed HR via an email on November 3 (after Covert had been suspended) (R. Exh. 12; Tr. 294, 295).

Covert said he clocked out of his shift and went home. Covert attended a due process meeting at the facility on November 6 with two individuals from the Respondent's human resources department. Angela Pfeifauf (Pfeifauf) was the lead personnel and Karina Durante was a HR trainee.

Covert was informed by Pfeifauf that he was suspended because he did not timely complete his report. Covert responded that a supervisor would routinely inform the officer if a report was not completed and he was never informed until November 2. Covert said he would be contacted after their meeting.

Pfeifauf testified that she is employed by the Respondent in human resources and was the lead person at the due process meeting with Covert. Pfeifauf stated she was responsible for labor relations, providing advice to various hotel and casino departments at the Cromwell and for investigating the suspension of employees.

Pfeifauf stated that Karina Durante was also present, who was in training to take over Pfeifauf's position.[6] Pfeifauf stated that Durante took notes at the meeting and most of her notes were a verbatim transcript of the meeting (R. Exh. 7).

Pfeifauf asked Covert as to why his report was not completed on time. In response Covert stated

> He said that he had forgotten it. It had gotten lost in the sauce, or something along those lines. But he had forgotten to do the report. It was busy. He had went on his days off, and then when he came back, he forgot to do it. No one reminded him.

Pfeifauf also recalled that Covert stated that he had a priority report to complete on October 22 involving a drug arrest. Covert also mentioned that it was a busy night and he was already on an overtime shift. Karina's notes indicated that Covert was aware that reports should be completed by the end of the day and as soon as possible (R. Exh. 7 at 2).

Pfeifauf stated that Covert did not return to work until October 25, two days after the incident. Pfeifauf stated that Covert did not raise any other concerns or reasons for not completing his report. Pfeifauf denied that Covert had mentioned that he was busy working on the Halloween shift (Tr. 256–258).

After the meeting, Covert received a phone call from Donathan a couple of days later. Covert was instructed to return his uniform and he asked why. Donathan said that the company was letting him go. Covert returned that evening and met with Donathan. He asked her of his chances to return to work and she did not know, but said she was unaware of anyone being discharged for not completing a report on time (Tr. 187).

A board of review meeting was convened on November 21 (GC Exh. 9). In attendance was Yolanda Mationg from human resources, Jesse Feil, a peer field training officer from a different property, and a retail manager named Annie Lupo (Lupo). The board explained to Covert the format of the review and a series of questions were asked of him.

The first set of questions was asked of Roque. Roque stated that a report needed to be completed immediately or before the end of the officer's shift. Roque also stated that Covert had time to complete the report even if he had a second one to complete dealing with a drug incident on the same night. Roque stated that he also reviewed Covert's past discipline and believed that Covert's performance negatively changed after he had received a final written warning.

Covert also responded to a series of questions. Covert admitted to not completing his report on time, but he explained that he was busy on completing a drug report on the same night,

[6] Durante was no longer employed by the Respondent at the time of the hearing.

which he took him until the end of his shift to complete. He also stated he was waiting on information from the nightclub's security detail about the incident. Covert admitted that it was his responsible to complete the report on time, but that a supervisor would usually remind an officer that a report was not completed. Covert said he was not working for 2 days after October 22 and never received a reminder from a supervisor to complete the report (GC Exh.9 at 2).

The panel met to review the facts in the case. The board decided to discharge Covert (Tr. 189, 190). Covert was effectively discharged on November 8 for violation of company policy and procedures (GC Exh. 2).

6. The Respondent's Rationale for Suspending and Discharging Robert Covert

Eric Golebiewski (Golebiewski) testified that he was recently appointed as the vice president for security operations for Caesars Entertainment Corporation. Prior to that time, Golebiewski served as the director of security for Respondent Cromwell, which he held for more than 8 years.

Golebiewski oversaw all security operations at the Cromwell and was aware of Covert's termination. He reviewed the recommendation and approved his termination. Golebiewski described the security team in November 2017. He said there were 35-40 officers and they reported to a security corporal, who reported to a security sergeant. Golebiewski identified Donathan as the sergeant in 2017. Donathan would report to Dennis Easterday, the lieutenant, who covered three properties (Cromwell, LINQ and Flamingo) that were under the Caesars Entertainment umbrella. Finally, all would report to Ruswood Roque who was the security captain at the time. Roque would report to the assistant director of security, who then reported to Golebiewski.

Golebiewski testified that Covert was terminated because he did not timely complete an incident report involving an arrest with an allegation of a sexual assault made by the victim. He reviewed the recommendation from human resources and a portion of the incident that involved Covert (Tr. 21, 22; GC Exh.3: incident report). Golebiewski also reviewed an email. The email was sent by Donathan and listed the reason for Covert's termination (GC Exh. 2). The email noted that Golebiewski, Dennis Easterday, and Roque were approving officials and Collins was the approving individual from HR. Donathan's email stated the reasons for Covert's termination were as follows

> Team Members will use professional judgment and will refrain from acts of gross misjudgment, carelessness, negligence in the performance of one's job.
> Team Members will obey all Company and department policies and procedures, supervisor's instructions, regulations and/or statutes of local, state and federal governmental agencies including those prescribed by the state gaming authority.
> Team Members will perform ail duties carefully, attentively, and with regard for giving a fair day's work for a day's pay.

Finally, Golebiewski also reviewed a "tweet" sent by the victim in the alleged sexual assault (R. Exh. 1). Golebiewski did not review anything else (Tr. 24–29).

Golebiewski said he learned about the tweet from the corporate legal department. Golebiewski stated that prior to the "tweet," no one knew that Covert had not completed his incident report (Tr. 36, 37). The "tweet" was sent by the alleged victim on October 27 and reads

> @CromwellVegas want tapes of assault & molestation occurred at @Drai's & ur Hotel early am 10/24/17. Missing tapes will be evid of guilt

As a field training officer, Begich testified that he trains new recruits on their duties and the proper methods in interacting with patrons at the hotel and casino. Begich also teach the new recruits on the Respondent's policies and procedures. In that regard, Begich testified that officers are responsible for creating incident reports after certain events occurred on the property. He stated that an incident report consists of two parts. First part is done on the same day and depending on the severity of the incident, the entire report may have to be completed in the same day or (if less severe) up to 3 days later.

Begich stated that anything involving a medical situation or an arrest would be considered as severe. Begich described an arrest dealing with property trespass as less severe type of arrest (Tr. 228, 229). Begich explained that medical and arrest incident reports needed to be completed quickly and placed in the files so they may be pulled if asked by a hospital or the police. Begich said the first part is the executive brief which should be done that day, but the narrative could be done a day later. He described an example where the incident report for an arrest could be completed a day later. Begich said that up to 3 days "was pushing it very far" (Tr. 237).

Begich said that the officers get reminders to complete the reports on a daily basis, usually throughout the shift and at the following day's briefings. Begich said the officers are reminded by the supervisors and the dispatcher. He said that the dispatcher, Craig Delaneva, would be responsible for the nighttime shift to inform the officers of any outstanding reports for that shift. Begich said the supervisors would give general reminders the following morning during the briefings (Tr. 238, 241).

Donathan testified that there is tracking system called ITrak that logs in all incidents during an officer's shift by the dispatcher. She stated that there would be hundreds of entries and a supervisor would use this log as a reminder if an incident report was not completed. Donathan testified that she was on vacation during the October 22 incident and did not review the logs that night (Tr. 123).

Roque admitted that there are reports which are not done on time and may be late. He stated that discipline is issued depending on the circumstances. He would agree that 5 days or more would warrant discipline (Tr. 67, 68, 274). Roque testified, however, that for arrests, the reports need to be completed immediately because arrests involve the police and medical personnel. Roque stated that arrests take precedence over other incidents, like missing property (Tr. 275). Roque noted that prior instances of untimely completion of reports (GC Exh. 14) involved trespasses, which he considered a low priority and that the arrest incident with a possible civil action against the company by the alleged victims involved a more severe situation

(Tr. 216, 277). Roque admitted that he is not aware of any other security officers who were terminated for failing to timely complete a report (Tr. 297).

Aisha Collins (Collins) testified that she is employed as the HR director with the Respondent since July 2017 and was familiar with the discharge of Covert. Collins reviewed the case with the former integrity advisor, Karina Durante, before making the recommendation to terminate Covert (Tr. 127, 128).

Collins stated that Covert was initially suspended pending an investigation, which said investigation was conducted by Durante and Pfeifauf. Collins was aware that the investigation centered on the failure of Covert to complete an incident report until 10 days after the incident. Collins said that Covert violated company policy because an incident report should have been completed before the end of his shift and she is aware that other employees would stay after their shift to complete a report.

Collins was also aware that Pfeifauf and Durante conducted a due process meeting with Covert while Covert was on his suspension. Collins said that the purpose of the due process meeting was to consider Covert's reasons for failing to complete the report and a review of Covert's past disciplines and the appropriate discipline for the extent of the infraction. Collins stated that there is progressive discipline and that Covert had a "live" final written warning prior to his termination. Collins stated that she does not look at discipline that may be older than 1-year old (Tr. 133, 134).

Collins stated that progressive discipline meant going from documented coaching, written warning, final written warning, and a suspension pending investigation. The conduct standards and definitions of various progressive discipline steps are listed in the Associate Handbook (R. Exh. 2). Collins also stated that there are three tracks of discipline, to included attendance, policy and performance, and variances (money handling) violations (Tr. 135, 136).

Collins explained that after a worker is suspended pending an investigation, the HR integrity advisor is involved in collecting the statements and other information about the incident and then schedule a due process review with the employee. After the due process review, the advisor (Durante, in this instance) review the investigation with Collins and a recommendation is made on the severity of the discipline. Collins stated that the employee is not informed as to the reason for the discipline pending the investigation. Included in the Associate Handbook is a section on the Board of Review (R. Exh. 2 at 7). Collins said that the Board of Review apply only to nonunion workers and is triggered when a discharged employee request an appeal after being discharged. Collins stated that the board consisted of a peer, a manager, and an HR person not involved in the case. After the disciplinary recommendation was reached between Collins and Durante, Durante sent an email to all the relevant managers involved in the discipline of Covert. On November 8, Durante sent out an email informing the various managers and supervisors of Covert's termination, effective on November 8 (Tr. 136–142; R. Exh. 3).

III. Discussion and Analysis

Credibility Assessment

The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the records as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all of all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra.

1. Robert Covert did not engage in protected concerted activity

Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . [Emphasis added]." Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

In *Meyers Industries (Meyers 1)*, 268 NLRB 493 (1984), and in *Meyers Industries (Meyers 11*), 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." The activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action. *Whittaker Corp*., 289 NLRB 933 (1988); *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). The object of inducing group action need not be express.

In *Mushroom Transportation Co*., above, the court held that "a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of employees." The court added that "[a]ctivity which consists of mere talk must, in order to be protected, be talk looking toward group action. . . . [I]f it looks forward to no action at all, it is more than likely to be mere 'griping.'" The standard set forth in *Meyers* remains the applicable test for determining when activity that "in its inception involves only a speaker and a listener" constitutes concerted activity. 281 NLRB at 887 (quoting *Root-Carlin, Inc.,* 92 NLRB 1313, 1314 (1951)). Under that standard, "'it must appear at the very least'" that such activity "'was engaged in with the object of initiating or inducing or preparing for group action or that it had

some relation to group action in the interest of the employees.'" Id. (quoting *Mushroom Transportation*, 330 F.2d at 685 (emphasis added)).

The protected activity engaged by Covert was complaining about Behrens allegedly walking off his post which posed a safety issue with the other officers and of the increased number of hours for the elevator post assignments. Covert said he complained to Donathan about Behrens in September 2017 in her office. Covert said no one was present during these conversations. Covert said he brought up the double standard issue that Behrens was always leaving his post without any discipline taken and Donathan replied that she will speak to Behrens about it. Covert would also tell Donathan that it was a safety issue when Behrens was AWOL from his post.

It is not clear exactly how many conversations Covert had with supervisor Donathan over Behrens, but Covert believed that he spoke Donathan 5–10 times in September, but could not recall any conversations in October. According to Covert, Donathan would tell him that she had spoken to him, but Covert alleged that Behrens' conduct did not change (Tr. 162–165). Covert testified that all of his complaints about Behrens to Donathan were verbal and he never complained by email or in writing (Tr. 195, 196).

Covert also complained to Donathan about the increased hours from 2 to 4 hours at the elevator post assignments. The complaint of standing for a longer period of time was tiresome and Covert suggested a chair or podium. This issue was also raised at preshift briefings by other officers to Donathan (Tr. 175, 176).

Bautista recalled having conversations with Covert about Behrens during the July-September timeframe. Bautista said that Covert would relate to him about his frustrations over Behrens because he was away from his post for "a couple of hours and we had to over him…" (Tr. 218). Bautista testified that these conversations would occur in passing with Covert "venting" maybe 3 to 5 times during this period.

Bautista testified that here were group briefings among the security officers before they are sent on their assignments. Bautista recalled that on occasions, the issue of having a post assignment by the elevator came up. He said that some officers complained that the 8 to 12-hour shift for the elevator post and a request was made to the supervisor that a chair or a podium be placed by the elevator for the guard to lean or sit during that post. Bautista did not recall who had made that request.

Donathan testified that Covert had approached her several times during quick one-on-one meetings in the summer (2017) complaining about Behrens. According to Donathan, Covert complained that Behrens was lazy and not doing his job. Donathan stated that Behrens also had complained to her that Covert was out to get him (Tr. 246). Donathan denied that Covert had complained to her about unequal treatment or that there was a safety issue with Behrens leaving his post (Tr. 248). Donathan also stated that an officer may leave his or her post for a number of different reasons, including break time, called away on an emergency, or given permission to leave.

I find that Covert's activity was one of self-interest and centered on his gripping over Behrens' job performance and nothing else. Covert's testimony attempted to color his own personal complaints about Behrens with the posture that he was speaking on behalf of other security officers over their safety concerns about Behrens' disappearances from his assigned posts. Covert also maintained that he took the lead in complaining over the increase of shift hours on the elevator post assignments. Covert testified he spoke to officers Bautista and Lick about this double standard, usually on an individual basis.[7] Covert estimated he had 5-10 conversations with the other officers. Batista and Lick were the only officers identified by Covert.

Covert said that Bautista talked about Behrens walking away from his post without any consequences. Bautista observed Behrens leaving his post and may have related to Covert that it was not right for Behrens to walk off. However, there were no discussions between Covert and Bautista about safety issues with Behrens walking off his post. Bautista credibly testified that he did not recall if Covert was going to speak to a supervisor and, certainly, Bautista was not recruited by Covert to induce group action. Bautista did not testify that he spoke to Donathan or any other supervisors about Behrens' conduct.

No such object may be reasonably inferred from Covert's exchange with Bautista, which would warrant a finding that Covert engaged in concerted activity. Covert's conversations with Bautista were not for the "purpose" of "mutual aid or protection." Covert gripped to Bautista about Behrens leaving his post. Bautista also observed Behrens doing so. Neither individual knew whether Behrens had permission to leave his post. Covert never encouraged Bautista to complain or that Covert would complain to the supervisor on the behalf of Bautista and the other officers. Bautista described Covert's remarks about Behrens as "venting." Bautista stated that he was not aware that Covert took his complaint to a supervisor. As noted above, a separate prerequisite for Section 7 protection is that concerted activity be conducted for the "purpose" of "collective bargaining or other mutual aid or protection." However, even if the conversation could be deemed concerted, there is no evidence that the conversation had the "purpose" of fostering "collective bargaining or other mutual aid or protection."

The conversation between Covert and Bautista cannot be considered to have the purpose of mutual aid or protection even under *Fresh & Easy Neighborhood Market*, 361 NLRB 151 (2014), where a Board majority expansively interpreted Section 7's "mutual aid or protection" clause. In *Fresh & Easy*, a single employee was found to have a purpose of mutual aid or protection when she sought to have two coworkers sign a piece of paper (reproducing an obscene message scrawled on a whiteboard) relating to her individual complaint. In reliance on a "solidarity principle," the Board majority reasoned that a purpose of mutual aid or protection could be inferred because the employee was "soliciting assistance from coworkers." Id., at 156 (internal quotation omitted).

[7] Officer Lick was not called as a witness and therefore, no one corroborated Covert's testimony that Behrens acted in an unsafe manner when he allegedly tackled Lick during an arrest of a patron. Covert was not present during this incident and the incident was allegedly related to him by Lick. Donathan testified that she did not recall that such an incident occurred with Lick and Behrens.

I also find that Covert did not take the lead in complaining about the increase in the hours that the officers had to stand by the elevator post. Bautista testified that several officers complained during the preshift meetings about the increased hours. Bautista did not recall whether Covert spoke up about the increased hours at the meetings or had raised that issue with a supervisor.

Here, Covert never acted to benefit himself or solicit assistance from a coworker. Covert did not ask Bautista to do anything, let alone to do something for himself. I credit the testimony of Donathan on this point. Donathan repeatedly testified that Covert would have quick conversations with her to complain that Behrens was lazy and did not do his job. Donathan credibly testified that Covert never mentioned any safety issues that could have affected the safety of other officers due to Behrens' job performance. Additionally, Officer Begich testified that Covert never discussed with him that Behrens was causing an unsafe working conditions for the officers. Begich said he never observed Behrens creating an unsafe work environment (Tr. 234, 235).

Thus, even applying *Fresh & Easy*, the absence of any solicitation of assistance means there was no purpose of mutual aid or protection, which again warrants a conclusion that Covert did not engage in protected activity during his conversations with Bautista and Begich.

2. The Respondent did not direct Covert not to discuss his discipline or threatened him with unspecified reprisal

As noted, Section 8(a)(1) of the Act makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of [those] rights." See, *Brighton Retail Inc.*, 354 NLRB 441, 447 (2009). The test for evaluating if the employer violated Section 8(a)(1) is "whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities." *Hills & Dales General Hospital*, 360 NLRB 611, 615 (2014).

As with all alleged 8(a)(1) violations, the judge's task is to "determine how a reasonable employee would interpret the action or statement of her employer…and such a determination appropriately takes account of the surrounding circumstances." *The Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011).

A rule or policy violates Section 8(a)(1) if it can reasonably be read by employees to chill their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C.Cir. 1999); *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004). The Board's analytical framework for determining whether the maintenance of a work rule violates Section 8(a)(1) of the Act was set forth in *Lutheran Heritage Village-Livonia*

> In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity

> protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Under the standard adopted in *The Boeing Co.*, 365 NLRB No. 154, slip op. at 3 (2017), the Board now holds that

> when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. We emphasize that the Board will conduct this evaluation, consistent with the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy," focusing on the perspective of employees, which is consistent with Section 8(a)(1).

Roque issued Covert a final written warning in a meeting held on October 12. The counsel for the General Counsel alleges that toward the end of this meeting, Roque instructed or directed Covert not to discuss his discipline with anyone else. Covert testified that "And before leaving the office, Russ (Roque) told me to keep this to myself. It's nobody else's business. Nobody else needs to know, nobody else has to know" (Tr. 168).

The counsel for the General Counsel further alleges that the Respondent violated Section 8(a)(1) of the Act because Roque' statements to Covert at their October 12 meeting that he "had enough" of the bickering between Covert and Behrens and was "tired" of "babysitting" the two of them reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights (GC Br. at 22–26). According to Covert, Roque told him that he "was tired of the BS" with him and Behrens and Roque felt he had to babysit the two officers and asked why they could not get along. Roque denied making this statement.

The counsel for the Respondent argues that Roque never gave a directive to Covert not to discuss his written warning anyone or that Roque told Covert that he was "tired" of babysitting the two of them.[8]

I agree with the Respondent and credit the testimony of Roque. I credit the testimony of Roque in denying that he gave Covert a directive or instructions not to discuss his written warning. I further credit Rogue's testimony when he denied stating to Covert that he was "tired" of "babysitting" him and Behrens or had "enough" of their bickering.

[8] As noted above, there is a written directive for Covert not to speak with others when he received his suspension pending the investigation. On this point, I agree with the counsel for the Respondent that it would be appropriate while a disciplinary investigation is being conducted for the employer to direct Covert not to speak to anyone about his suspension and the pending investigation. The counsel for the General Counsel does not disagree that the disciplinary matter may be kept confidential during an ongoing investigation into the circumstances of the discipline.

Roque did not recall directing Covert not to talk to others about his warning. Muertegui was present at the meeting and did not recall any such discussions with Covert (Tr. 264, 265). As such, it is reasonable to give equal weight to the testimony of Roque and Muertegui as to whether the directive not to talk about his discipline was given to Covert.

I credit the testimony of Roque and Muertegui over the testimony of Covert. In resolving the credibility of the witnesses in favor of the Respondent, it is significant to consider Covert's subsequent testimony with his conversations with Bobby Johnson. Johnson was considered a friend and mentor to Covert. Covert said he met Johnson approximately 2 weeks later after receiving his written warning. A reasonable factual finding could be made that Covert spoke to Johnson about his final written warning because, in turn, Covert testified that Johnson told him that he had received emails and texts from other unidentified supervisors who had considered Covert a "virus" and a "problem child."[9] Roque denied calling Covert a virus and a problem child. Roque also denied sending out such emails to other supervisors.

The counsel for the General Counsel subpoenaed all documents, including emails regarding this and other alleged violations in the complaint. The Respondent produced over 16,000 pages of documents pursuant to the subpoena. No such emails were recovered by the General Counsel. More importantly, the counsel for the General Counsel did not call Bobby Johnson as a witness, who could have easily corroborated that he made such statements to Covert. Johnson also could have produced the emails that Covert said was sent by Roque to Johnson referencing Covert as a virus and a problem child.

Bystander employees are not presumed to be favorably disposed toward any party and no adverse inference is drawn against a party for not calling them. *Torbitt & Castleman, Inc*., 320 NLRB 907, 910 fn. 6 (1996), affd. on point 123 F.3d 899, 907 (6th Cir. 1997). However, the judge may weigh the General Counsel's failure to call an identified, potentially corroborating bystander as a factor in determining whether the General Counsel has established by a preponderance of the evidence that a violation has occurred. *C & S Distributors*, 321 NLRB 404 fn. 2 (1996), citing *Queen of the Valley Hospital*, 316 NLRB 721 fn. 1 (1995); *Stabilus, Inc*., 355 NLRB 836, 840 fn. 19 (2010). [10]

When weighing the credibility of testimony between two individuals, it becomes apparent that in viewing the totality of the circumstances, that is, the counsel for the General Counsel's failure to subpoena Bobby Johnson who could have testified and corroborate as to what exactly

[9] In this regard, even assuming that Roque directed Covert not to speak to anyone about his written warning, Covert obviously did not felt chilled or refrained from exercising his Sec. 7 rights when he freely spoke to Johnson about his warning and how other supervisors viewed him as a virus. The potential impact of this alleged directive on Covert's NLRA rights was minimal at best.

[10] In finding that Roque did not harbor any animus towards Covert, I also find that Covert was not threatened with unspecified reprisal. The Board has established an objective test for determining if "the employer engaged in conduct which would reasonably have a tendency to interfere with the free exercise of employee rights under the Act." *Santa Barbara New-Press*, 357 NLRB 452, 476 (2011). The counsel for the General Counsel has not shown that the statements allegedly attributed to Roque that he was tired of babysitting Covert and Behrens would be considered as a threat with some unspecified reprisal against Covert in the future. No evidence or testimony was proffered by the General Counsel that Roque told Covert to stop complaining or that Covert be careful as to what he was saying about Behrens.

Roque said about Covert's attitude and the failure of any derogatory emails being proffered to support Covert's contention that management thought he was a virus and problem child, the General Counsel ultimately failed to establish by a preponderance of the evidence that any inappropriate directive or unspecified threats were made by Roque. *Stabilus, Inc*., above; *C & S Distrib.,* above

Accordingly, I recommend that allegations in paragraphs 4(b)(1) and (2) of the complaint be dismissed.

3. The Respondent did not issue a final written warning to Robert Covert because he engaged in protected concerted activity

In applying the *Wright Line* framework, the General Counsel has the initial burden of establishing that an employee's protected concerted activity was a motivating factor in an employer's decision to take adverse action against the employee. 251 NLRB 1083 at 1089 (1980). As noted above, having found that Covert did not engaged in protected activity and having found that the employer did not harbor any animus against protected concerted activity, I now find that the Respondent did not violated the Act when it issue the final written warning to Covert.

Captain Roque testified that he issued a final written warning to Covert on October 12 because of the hostile statements made by Covert about Behrens. Roque stated that

> About the statements, I believe it was remarks pertaining to if Michael Behrens were to drop dead or something would happen when Michael Behrens was in dispatch, he would not respond or he would take his time in responding. And Michael Behrens is a waste of air and a skin—waste of skin-suit.

An investigation was conducted over the hostile statements made by Covert before the final written warning was issued. Officer Begich testified that he and a slot technician named AJ. Sabra was walking past Covert and Sabra made a satirical comment to Covert that Covert's "buddy" Behrens was in dispatch. Covert responded that Behrens was "not his buddy" and that the remark made by Sabra was not funny. Begich said that Sabra replied that he didn't mean anything by his remark. Begich provided a statement (R. Exh. 6) during the investigation of the written final warning that Covert replied

> "If paramedics showed up for Officer Behrens in dispatch, that he would take his time getting there."

Sabra also provided a written statement on October 11 regarding his conversation with Covert (R. Exh. 10). Saba stated that as he was approaching Begich and Covert, Saba asked Covert if he was leaving early because Behrens was on duty. Covert replied that by ranting to Saba how much he hated Behrens and if Behrens

> died right now in dispatch, that h would not feel an ounce of sympathy, and that if paramedics arrived to help Mike (Behrens), he would take his time escorting them to Mike to give him medical care.

The corroborating statements by Sabra and Begich strongly support the basis for Covert's final written warning. There is no showing that Sabra and Begich had any animosity toward Covert. Indeed, Sabra was not even employed as security officer. Roque testified that Behrens also received discipline over the same incident with Covert. Roque stated that Behrens received a documented coaching on October 12. The discipline stated, in part, that "…Behrens was conducting (himself) in the same type of behavior (as Covert) which results in conversations with other associates that creates a hostile work environment" (R. Exh. 11). The only reason that Behrens received a documented coaching as discipline was because Behrens, unlike Covert, had no prior discipline in the area of violating company policy and procedure. Roque explained that under the Respondent's progressive discipline policy, Behrens received a documented coaching because he had no prior discipline for policy performance. Behrens was on final written warning for his attendance infractions (Tr. 291, 292).

There was another incident during the October timeframe between Covert and Behrens and Roque took no disciplinary action against Covert. Muertegui testified that both Covert and Behrens came up to him on October 12 regarding an incident at the dispatch office. According to Muertegui, Behrens was entering the dispatch office with his bag and Covert was partially standing by the doorway at the time. Behrens brushed against Covert on his way into the office and it is alleged that comments were made about the brushing. Muertegui was not present but the incident was reported to him by Covert and Behrens. Muertegui requested both parties to make a written statement (Tr. 268; R. Exh. 9).

In the written statement prepared by Behrens on October 12, he stated that on his way into the dispatch office, his bag brushed against Covert. Behrens alleged that Covert yelled, "can you say fucking excuse me." Behrens said he then got hold of officer Lick and notified him as to what had happened (R. Exh. 9 at 2).

Lick also prepared a written statement. Lick stated that on October 12, Behrens pulled him aside after the morning briefing and said he had another altercation with Covert. According to Lick, he was informed by Behrens that Covert was blocking the doorway and Behrens apparently brushed his bag against Covert as Behrens entered the dispatch office. Lick said that Behrens told him Covert said "you're not going to fucking say excuse me."

Roque testified that he received an email from Muertegui on October 12 regarding Covert allegedly brushing up against Behrens in the dispatch doorway by Covert. Roque stated that he conducted an investigation and reviewed the statements written by Behrens and Lick. Roque decided to take no disciplinary action against Covert over this incident.

The dispatch doorway incident is significant to note because if Roque and the Respondent was out to get Covert because of his protected concerted activity, as alleged by the General Counsel, the Respondent could have used this incident to issue Covert a final written warning and his next policy and procedure infraction would have resulted in his discharge. Roque was obviously well aware of the progressive discipline policy and he could have recommended discharge if he had harbored any animus towards Covert's alleged concerted activity and not wait until November 8 to discharge Covert.

Accordingly, I recommend that this allegation (par. 4(c)) in the complaint be dismissed.

4. The Respondent did not discharge Robert Covert because he engaged in protected concerted activity

The finding that that the conversations engaged by Covert were unprotected under Section 7, means the Covert's discharge was lawful under Section 8(a)(1). Assuming that Covert engaged in protected concerted activity, I would nevertheless find that his discharge was lawful.

Whether Covert's discharge was unlawful under the counsel for the General Counsel's principal theory of liability must be determined by application of the Board's decision in *Wright Line*. *Wright Line,* above, enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB* v. *Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983); *American Gardens Management Co.,* 338 NLRB 644 (2002).

Under *Wright Line*, the General Counsel satisfies his initial burden by showing that (1) the employee engaged in protected concerted activity; (2) the employer had knowledge of that activity; and (3) the employer bore animus towards the employee's protected activity. If the General Counsel's burden is met, the employer may defend by proving that it would have taken the adverse action even absent the employee's protected concerted activity.

Here, assuming that the General Counsel met his *Wright Line* burden, I find that the employer would have taken the same adverse action even absent Covert's alleged concerted activity.

Discriminatory motive may be established in several ways including through statements of animus directed to the employee or about the employee's protected activities, *Austal USA, LLC*, 356 NLRB 363, 363 (2010); the timing between discovery of the employee's protected activities and the discipline, *Traction Wholesale Center Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000); evidence that the employer's asserted reason for the employee's discipline was pretextual, such as disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a nondiscriminatory explanation that defies logic or is clearly baseless, *Lucky Cab Co.*, 360 NLRB 271 (2014); *ManorCare Health Services – Easton,* 356 NLRB 202, 204 (2010); *Greco & Haines, Inc.,* 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088 fn. 12, *citing Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556–557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

Here, there has been no deviation from past practices in implementing the discharge. There were no inconsistencies in the reason for the discharge. There were no disparity of treatment between Covert and other employees with similar work records or offenses. As such, discriminatory motivation cannot be reasonably inferred from the employer's action to discharge Covert. *WF. Bolin* Co. *v. NLRB,* 70 F. 3d 863,871 (6th Cir. 1995).

I find that HR Director Collins credibly testified that proper procedures were taken with Covert's discharge. Collins stated that Covert was initially suspended pending an investigation, which is consistent with company policy. No evidence was proffered by the General Counsel

that would require the employer to inform the worker of the reason for the suspension at this stage of the investigative process or that this had deviated from the employer's standard practice when conducting investigations.

The investigation was diligently conducted by Durante and Pfeifauf. Pfeifauf and Durante also conducted a due process meeting with Covert while Covert was on suspension. Collins said that the purpose of the due process meeting was to consider Covert's reasons for failing to complete the report and a review of Covert's past disciplines and the appropriate discipline for the extent of the infraction. Collins stated that there is progressive discipline and that Covert had a "live" final written warning prior to his termination.

Collins stated that progressive discipline meant going from documented coaching, written warning, final written warning, and a suspension pending investigation. Collins explained that there are three tracks of discipline, to include attendance, policy and performance, and variances (money handling) violations. The record shows that Covert received a documented coaching on policy and performance on August 23, 2017 (GC Exh. 12). Covert then received a written warning for violating policy and performance on September 15, 2017. Covert was on his final written warning on the policy and performance track when he was discharged.

Consistent with company policy, after the due process review, Durante reviewed the investigation with Collins and a recommendation was made on the severity of the discipline. Consistent with the Associate Handbook, Collins said that Covert exercised his right for a Board of Review of his discharge. Collins stated that the board consisted of a peer, a manager, and a HR person not involved in the case. There has been nothing proffered by the General Counsel to show that the employer did not follow the necessary and required steps in the discharge process or was inconsistent with the progressive discipline policy taken against Covert.

Secondly, I also find that Covert was not disparately treated in comparison with employees under similar circumstances. The counsel for the General Counsel argued that Covert was disparately treated because no other security officer had been discharged by the Respondent for not timely completing an incident report.

There is no doubt that incident reports are not always timely completed. Roque candidly acknowledged that was true. The record shows several incidents when reports were not done on the same day as the officer's shift. Some reports have been late and not completed on time from 3 days up to 10 days from the occurrence of the incident (GC Exhs 4, 5, 6, 7, and 8).

However, I credit Roque's testimony that most, if not all, of the reports that were not timely completed were "lower priority" and less severe (Tr. 276), such as trespass infractions, as compared to the situation with Covert. With Covert, there was an alleged sexual assault and an arrest of two females with a threat of a lawsuit against the Respondent by one of the victims. Roque testified that there was urgency by Respondent's legal department to obtain the incident report and when Roque inquired, it was discovered that Covert had not completed the report. The examples provided by the General Counsel were not comparable to the seriousness in Covert's situation. Further, under the employer's progressive discipline policy, unlike Covert, no other security officer was on a written final warning to warrant discharge.

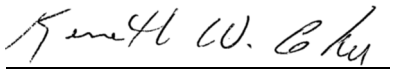
Finally, there were no shifting reasons for Covert's discharge or that the nondiscriminatory explanation defies logic or is clearly baseless. The sole reason for Covert's discharge was failing to timely complete an incident report following a written final warning under the employer's progressive discipline policy. Officer Begich explained that medical and arrest incident reports needed to be completed quickly and placed in the files so they may be pulled if asked by a hospital or the police. Begich said the first part is the executive brief which should be done that day, but the narrative could be done a day later.

It is undisputed that Covert did not timely complete any portions of the incident report during his work shift. Covert's explanation was that he was too busy that night and simply forgot when he returned from his days off from work. Covert repined that no one reminded him. However, I credit the testimony of Donathan and Begich that a supervisor would remind an officer of an overdue report during the preshift briefings and that the ITrak system would have jogged Covert's memory to complete his report. Even Covert admitted that supervisors would routinely remind officers at their preshift meetings to complete the reports from the day before. This was inconsistent with his prior testimony that no supervisor had reminded him until November 2 to complete the report. I also credit Roque's testimony that ultimately, it was the officer's responsibility to complete a report on time. Begich, who also served as a field training officer, corroborated that testimony by stating that officers are given classroom training on completing reports on a timely basis and that an overdue report of more than 3 days "was pushing it very far"(Tr. 237).

Accordingly, I find that the Respondent has proved that it would have discharged Covert on November 8, even in the absence of any alleged protected concerted activity.

I therefore recommend that the complaint be dismissed in its entirety.

Dated: Washington, D.C. October 10, 2018



Kenneth W. Chu
Administrative Law Judge